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REGULATING TECHNOLOGY THROUGH COPYRIGHT
IS "SUI GENERIS" A GOOD IDEA?

"[T]he assumption that more and more layers of IP protection means more innovation and growth appears not to hold up." Thus found the first evaluation of the Database Directive (1996/6/EC) published in December 2005 by the European Commission. According to the Gale Directory of Databases, EU-based entries dropped from about 4000 in 2001 (when most member states had implemented the Directive) to about 3000 in 2004 (the level it had been in 1998, when implementation began). During the same period, US entries increased from some 6000 in 1998 to over 8000 in 2004, despite the lower standard of protection for non-original databases under the Supreme Court decision in *Feist* (1991). The policy aims articulated in Recitals (9) to (12) of the Directive had clearly not been met: to encourage European investments in databases, in order to catch up with "the world's largest data-producing third countries" (Community speak for the US).

Does this candid analysis mark the end of the "sui generis" database right, a regulatory experiment unique to the Europe? Apparently not, says the report, as "the attachment to the new right is a political reality". No surprise here. I too become easily attached to rights I find myself with.

Instead, the Commission has been consulting on four policy options, only one of them is repealing the Directive. This remains a remote possibility as it would result in the "dis-harmonisation" of the level of database protection under copyright law in Europe. It would also re-open an old ideological debate on the threshold of originality. ("Original" in the *droit d'auteur* sense is said to involve more than the effort or investment that may be sufficient under the "skill and labour" approach of common law. In practice the standards are much closer than ideologues suggest.)

In principle, the idea of tailor-made policy tools for regulating new technologies is attractive. Economists have long argued that incentives that work for one technology (pharmaceuticals) may not work for another (software): see for example Lester Thurow's 1997 article "Needed: A New System of Intellectual Property Rights" in the *Harvard Business Review*. Underlying the Database Directive was such a feeling that the UK was overprotecting compilations of facts, such as directories, dictionaries and maps. As part of the 1996 deal, the UK agreed to lift its copyright threshold so that non-original databases would no longer receive the benefits of a term of 70 years *post mortem auctoris* under copyright law. The resulting "protection gap" would be covered with a new database right that was thought to be more circumscribed (15 years), and tailored to the investment conditions of digital information processing and storage systems.

Lawyers tend to be sceptical of *sui generis* rights primarily because of the legal uncertainty they generate. In particular, the Database Directive introduced new concepts, such as "obtaining", "verifying", "extraction" and "re-utilisation" for which there was no existing jurisprudence neither in common law nor civil law jurisdictions. As it turned out, in commercial practice the new database right proved stronger than copyright would have been in at least three respects: (i) continuous investment in up-dating a database appeared to confer protection in perpetuity; (ii) repeated use of insubstantial amounts of a database could amount to infringement, regardless of changes made to format and presentation; (iii) the "fair use" type exceptions of copyright law did not apply.

In the British Horseracing Board (BHB) v. William Hill case (November 2004), the European Court of Justice tried to reign in these information-restrictive and anti-competitive consequences of the database right with a fairly adventurous interpretation of the wordings of the Directive. Without going into the details of this notoriously difficult decision, it appears that the Court tried to separate databases that are spin-offs of the main activity of the database producers (such as fixture lists, league tables, post codes) from those databases that are compilations of "existing independent materials", such as compilations of meteorological data or legal decisions. Only the latter would receive protection under the database right (because competitors always could create these data themselves if they were prepared to invest).

Many valuable databases do not fall into these categories. Consider certain financial data that only come into existence at the stock market; consider consumer preference data produced by websites offering content in order to produce consumer preference data (for an ingenious example, see www.last.fm). Even in the case of the British Horseracing Board, one could argue that its *raison d'être*, and business model, is to enable bets to be placed on horses – not to run races. These databases are not spin-offs of other activities, but constituted by these activities (and therefore they might not have been produced anyway). Still they may not need more protection than contract law makes available through licenses for first use.

Given this complexity, a little *sui generis* regulation is a dangerous thing even from an economic perspective. Broad principles of competition law, combined with a presumption against new layers of rights may well produce more innovation and growth. I am curious to see how the European Commission will extract itself from this mess.

About the author
Martin Kretschmer is Professor of Information Jurisprudence and Joint Director of the Centre for Intellectual Property Policy & Management (www.cippm.org.uk) at Bournemouth University, UK. He is also project director (with Prof. Lionel Bently) of a major Arts and Humanities Research Council (AHRC) project on copyright history at the Centre for Intellectual Property & Information Law, Cambridge University (2005-7). Previously, Martin was consultant editor at BBC Worldwide (1994-5) and a faculty member at City University's Cass Business School, London (1996-9).